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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO GARCIA CASTANEDA,

Defendant and Appellant.

A156689

(Alameda County  
Super. Ct. No. 18CR009627)

A jury convicted Mario Garcia Castaneda<sup>1</sup> of first degree murder (Pen. Code,<sup>2</sup> § 187, subd. (a)). The trial court sentenced him to 29 years to life in prison, which included four one-year term enhancements for prior prison terms (§ 667.5, subd. (b)). Castaneda now appeals, contending the court should have dismissed the charges as a sanction for the government's failure to preserve potentially exculpatory surveillance footage. Castaneda also argues his prison priors must be stricken pursuant to Senate Bill No. 136 (2019–2020 Reg. Sess.) (Senate Bill 136). We strike the four one-year

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<sup>1</sup> Defendant's name has been misspelled on various occasions as Castineda. At trial he had informed the trial court that it is in fact Castaneda.

<sup>2</sup> Undesignated statutory references are to the Penal Code.

enhancements imposed under section 667.5, subdivision (b), but otherwise affirm the judgment.

## **I. BACKGROUND**

### ***A. The Charges***

An information charged Castaneda with the first degree murder of John Maurice Bell (§ 187, subd. (a)), with an allegation that he personally used a knife in committing the murder (§ 12022, subd. (b)(1)). It also alleged enhancements for Castaneda's prior prison terms (§ 667.5, subd. (b)) for assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)); receiving a stolen vehicle (§ 496d, subd. (a)); possession of a firearm by a felon (one conviction under [former] § 12021, subd. (a)(1) [now § 29800, subd. (a)(1)] and two convictions under § 29800, subd. (a)(1)); and vehicle theft (Veh. Code, § 10851, subd. (a)). The information further alleged an enhancement for Castaneda's commission of the charged offense while released on bail or his own recognizance (§ 12022.1).

### ***B. The Evidence Presented at Trial***

Bell and his wife, Felecia Wright, were homeless and lived together in a tent encampment under a highway in Oakland. The encampment was several blocks away from an Amtrak train station located in Jack London Square. Bell and Wright went to the station nearly every day to charge their phones or use the restrooms.

At approximately 5:00 or 6:00 o'clock in the evening on May 26, 2018, Bell rode his bicycle to the Amtrak station to charge his phone. The bicycle was a chrome-like silver. Around 9:30 p.m., Bell realized that his bicycle was missing; someone had taken the bicycle and left another one in its place. Bell did not know who took it. He returned to his tent with the other bicycle at approximately 10:00 p.m. and told Wright what had happened.

About half an hour later, Wright heard someone call Bell to come outside of their tent and ask, “Is this your bike?” Bell left the tent, while Wright stayed inside where she heard people conversing outside.

After 15 to 20 minutes, Wright heard her neighbor, Keith,<sup>3</sup> call her name from outside her tent. Wright hurried outside, where she saw Bell lying down in the street. Bell appeared to be in a lot of pain and had blood flowing from wounds on the upper part of his chest and near his belly. Bell told Wright several times, “ ‘I’ve been stabbed. Man, Rio stabbed me. He stabbed me.’ ”

Everyone in the area outside of the tent dispersed. Keith helped Bell put pressure on his wounds, while Wright ran back into the tent and called for an ambulance.

At approximately 11:18 p.m., officers were dispatched to the encampment after a stabbing was reported. When the officers arrived, Bell was lying down in the middle of the road, yelling and screaming in pain, and suffering from stab wounds in his abdominal area. Officers provided Bell with first-aid care until the paramedics arrived.

When asked by officers, “ ‘Who did this to you?’ ” Bell replied, “ ‘The short Mexican dude.’ ”<sup>4</sup> Officers also spoke to Wright, who explained Bell told her that “Rio” had stabbed him. Bell was then transported to a nearby hospital, and several officers followed.

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<sup>3</sup> Wright did not know Keith’s last name.

<sup>4</sup> We granted Castaneda’s motion to augment the record to add several exhibits admitted at trial, which included transcripts of conversations between the police and Bell, Wright, and Castaneda, as well as a compilation of the surveillance footage from Seawolf Public House, Sierra Deli, and Shell gas station.

At the hospital, officers took down Bell's statement concerning the incident. Bell stated he was stabbed shortly after 11:00 p.m. on May 26, 2018, by a male who looked Asian, five feet three inches tall, 125 pounds, and in his twenties. When Bell saw the man with his bicycle outside of his tent, he told the man he had his bicycle, grabbed his bicycle from the man, and walked away with the bicycle towards his tent. Bell then stopped and looked back at the man. As he turned around, he and the man were "face to face," when suddenly the man stabbed Bell twice in his stomach area. Bell collapsed to the ground and saw the man grab his bicycle and ride towards Jack London Square in Oakland.

Bell stated he had seen the man before and had "heard people call him Rio," though he was unsure he could identify the man in the future. Bell then reviewed the statement as documented by the police, affirmed its accuracy, and signed it.

Meanwhile, around 11:30 p.m., other officers patrolled the vicinity of the encampment in search of a "male Hispanic on a chrome bike." They located the bicycle and Castaneda at a nearby Shell gas station. Officers spoke to Castaneda and recorded the interaction with a body-worn camera. Castaneda stated the bicycle was not his and denied he "rolled up [to the gas station] on that bike." The officers did not detain Castaneda at that time; they could not confirm if he was the suspect because they did not see him either holding or riding the bicycle at the gas station. Still images of the bicycle and Castaneda were captured from the body cameras and sent to the officers who were at the hospital with Bell.

Bell was shown the photographs of the bicycle and Castaneda from the gas station. Bell stated, " 'That's my bike.' " He also stated that the person

in the other photograph was “possibly” or “probably” the person who stabbed him.

The hospital discharged Bell around 4:30 the morning of May 27, 2018, after determining his wounds were “superficial.” Bell returned to his tent. His condition deteriorated in the days after his discharge. His pain worsened and he lost his physical strength and appetite. Bell ultimately passed away on May 31, 2018, due to peritonitis, an infection of the abdominal cavity that developed from one of his stab wounds.

Officers retrieved surveillance footage from the night of the incident from three businesses located near the encampment: Seawolf Public House, Sierra Deli, and Shell gas station. Detective Hector Jimenez reviewed all of the surveillance footage. Seawolf Public House, located about two blocks away from the encampment, captured Castaneda riding Bell’s bicycle away from the encampment and towards the water at approximately 11:15 p.m.<sup>5</sup> Sierra Deli, which is several blocks further from the encampment, also showed Castaneda riding Bell’s bicycle at approximately 11:20 p.m. Shell’s cameras showed Castaneda arriving at the gas station on a bicycle at approximately 11:21 p.m.

Officers attempted to obtain surveillance footage of the Amtrak station where Bell alleged his bicycle was stolen. Although they were able to download a video file containing surveillance from the night of the stabbing from an office near the station, they could not view it.

On June 2, 2018, officers were dispatched to an area several blocks away from Jack London Square after receiving a tip that Castaneda was seen

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<sup>5</sup> Seawolf Public House had timestamps on its surveillance footage that were about two minutes behind. Sierra Deli’s timestamps were accurate. Shell’s timestamps were about four minutes behind.

traveling in the area. Officers spotted and called out to Castaneda, who appeared nervous. Castaneda started running away from the officers. As the officers pursued him, a knife fell out of his pocket.<sup>6</sup> Officers were able to stop and arrest Castaneda.

Castaneda testified on his own behalf. In May 2018, Castaneda was homeless and visited the encampment where Bell lived at least twice a day. In April 2018, Castaneda was introduced to Bell as “Rio” through another individual at the encampment. “Rio” is Castaneda’s nickname. Bell bought drugs from Castaneda on five or six occasions. They greeted each other and conversed for approximately 20 minutes whenever they saw each other at the encampment or the Amtrak station. They also exchanged phone numbers. Castaneda testified they were acquaintances. Bell later introduced Castaneda to Wright.

Castaneda saw Bell on the morning of May 26, 2018, while selling drugs at the encampment. Castaneda saw Bell again later that day shortly before sundown. Castaneda then went to the Amtrak station to charge his phone.

Castaneda returned to the encampment around 11:00 that evening to sell heroin. After selling drugs in one part of the encampment, he moved closer to the area near Bell’s tent to sell drugs to other people. Castaneda saw Bell standing in the street along with six or seven other people. Castaneda was about 30 to 50 feet away from where Bell was standing. Castaneda then heard a “skirmish” and “quick movements” before seeing

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<sup>6</sup> The knife was tested for DNA. A one in 88 nonillion match probability for Castaneda’s was found on the knife, but there was no match for Bell’s DNA.

people scatter and Bell on the ground. He thought Bell “was knocked out” and did not know he had been stabbed.

Castaneda noticed a bicycle in the middle of the street. While Bell was lying on the floor, Castaneda took the bicycle. He testified he did not want to be in the area any longer because he believed that either gunshots would “pop off” or police would arrive. He then rode the bicycle to the Shell gas station.

Castaneda encountered officers at the Shell gas station. He admitted to the officers the bicycle was not his. Castaneda denied that he rode the bicycle to the gas station, but testified he was being untruthful at the time because he did not like speaking to and mistrusted the police. Castaneda tried to return to the encampment but stayed away in a nearby alley after spotting police and the fire department in the area.

Castaneda testified he did not stab Bell. He also denied he took Bell’s bicycle at the Amtrak station earlier that day.

Castaneda testified that shortly before he was arrested, he ran away from the police because he had a warrant. He admitted he had a knife on him at the time, which he carried regularly, on the date of the incident. When interviewed at the police station after his arrest, Castaneda denied he knew or had ever seen Bell. Castaneda also was shown the surveillance footage from Seawolf Public House, Sierra Deli, and the Shell gas station. He admitted it was him in the footage riding a bicycle around Jack London Square.

Castaneda is Hispanic and approximately five feet eight inches tall and weighed approximately 140 pounds on May 26, 2018. Castaneda previously sustained convictions for assault, possession and sale of drugs, receipt of stolen property, possession of a gun, and driving a stolen car.

### ***C. The Verdict and Sentence***

The jury convicted Castaneda of first degree murder (§ 187, subd. (a)) and found that he personally used a knife in committing the murder. (§ 12022, subd. (b)(1).) The trial court found the prior prison term allegations to be true. It also found that Castaneda had been released on bail at the time of the offense.

The court sentenced Castaneda to 29 years to life in prison. This total consisted of a term of 25 years to life for the murder count and four consecutive one-year terms for the prior prison terms served (§ 667.5, subd. (b)) (the third and fourth priors, as well as the fifth and sixth priors, resulted in two periods of incarceration rather than four). The court stayed the weapon enhancement under section 12022, subdivision (b)(1).

Castaneda appealed.

## **II. DISCUSSION**

### ***A. The Denial of Castaneda's Motion To Dismiss***

Castaneda contends the trial court erred by denying his motion to dismiss based on the police's failure to preserve video surveillance evidence of the Amtrak station. According to Castaneda, the exculpatory value of the video was apparent, and the government acted in bad faith in failing to preserve it.

#### ***1. Additional Background***

Before trial, Castaneda moved to dismiss his case, alleging the government failed to preserve video surveillance of the Amtrak station, in violation of his due process rights pursuant to *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*). Castaneda maintained that the video might have been exculpatory if it showed someone other than Castaneda stealing the bicycle.



According to Castaneda, such evidence would impeach Bell's statements of how the incident transpired. Castaneda also alleged that the failure to preserve the footage was in bad faith.<sup>7</sup>

The trial court conducted an evidentiary hearing before trial. Rhea Fulgueras, a technician with the police department, testified that Detective Jimenez directed her to obtain surveillance footage from cameras facing the Amtrak station on the night of the incident. In July 2018, Fulgueras went to an office building located at 55 Harrison Street, which is across the street and a building away from the station. The building granted her access to its surveillance system. The system required a username and password, which Fulgueras obtained from the building's property management office. Fulgueras successfully logged onto the system and searched for footage on May 26, 2018, from 12:00 p.m. to 9:00 p.m. Fulgueras was able to view the surveillance but could not download it.

Fulgueras then called Vicon, the manufacturer of the security camera and its software, for technical support. Vicon informed her that 55 Harrison Street was running on a free trial version of the surveillance software which did not allow downloading. Vicon then offered Fulgueras a free 30-day subscription so that she could download videos. Fulgueras subscribed and downloaded the video footage onto a USB.

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<sup>7</sup> Alternatively, Castaneda argued the court at a minimum should give an instruction that would have allowed the jury to draw inferences more favorable to the defense from the failure to preserve the video. In his reply brief, Castaneda concedes he did not specifically renew this request in his opening brief, but states he "would not refuse [it]" should we find it an appropriate remedy for any *Trombetta* violation. Although we may treat the claim as forfeited because it was not raised in the opening brief (see *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 419), we need not address it in light of our conclusion below that no sanctions were required.

But Fulgueras could not play the video on her laptop or on certain computers at the police's administration building. She called Vicon again, who informed her that 55 Harrison Street used a "really old system" and that the video could not play on "a new or a very old computer." Fulgueras eventually found a computer that was able to play the video. She then made copies of the file. Fulgueras verified the copies worked. She gave a copy to Detective Jimenez. Fulgueras erased the data on the USB she used to originally download the video so that she could reuse the USB.

Detective Jimenez testified he asked Fulgueras to obtain the footage of the Amtrak station to see if he could identify who had stolen Bell's bicycle at the station. He received a copy of the video from Fulgueras on July 18, 2018, but discovered that day he could not play it. Jimenez entered the username and password that Fulgueras gave him and tried to play the file using different video players but could not do so. Jimenez also sent the file to Sergeant Inez Ramirez, who was skilled in working with computers and surveillance videos. He was unsure if Ramirez was able to play the video.

Detective Jimenez informed Fulgueras he could not play the video and told her to contact 55 Harrison Street again. Approximately two or three weeks before trial, Fulgueras returned to 55 Harrison Street where she learned the building had converted its surveillance system to a "new system." Around that time, the prosecutor contacted Jimenez about the Amtrak footage, informing him that he also had difficulty playing the video.

Neither Fulgueras nor Detective Jimenez tried to record the footage through a secondary recording device such as a body camera or cell phone. Jimenez did not go or send another officer to the Amtrak station, explaining Fulgueras was "trained in that field" and that he was "fully confident . . . in her abilities" to obtain the footage. Jimenez was not concerned when he did

not speak to Fulgueras for several months since receiving the copy of the file. He stated that “[t]he data is there,” but that they “just weren’t able to play it. So it’s not an issue of running over memory or anything like that.” Jimenez also testified that he received no indication from anyone that the video contained exculpatory evidence.

The trial court heard arguments on the motion. The People argued there was no evidence the video was exculpatory. They also contended that the surveillance footage was not destroyed, the police had made extensive efforts to get the video to play, and all parties had the file.

The defense argued that the video was “‘potentially useful’” under *Youngblood*. According to the defense, if the video reveals no one had stolen Bell’s bicycle at the Amtrak station, then Bell’s statements that someone had stolen his bicycle would be impeached. Alternatively, if the video shows someone other than Castaneda stole the bicycle, then Bell’s statements identifying Castaneda as his assailant also would be called into question. The defense further argued that although the data exists, the police nonetheless failed to preserve that data “in a format that we can watch it.”

The trial court denied the motion. It recounted the efforts made by Fulgueras to download and view the video. The court concluded: “Based on the totality of these circumstances and the efforts and the fact that it requires some effort on all parties’ part to communicate with Vicon, the third-party vendor, to determine whether there is some way in which this video can be watched either at their facilities, or they are setting up an opportunity to be able to view it, or the fact that because it is a discontinued software that it may be lost to all. So it does not appear that this is a situation where there was bad faith on the part of the police department. It is probably advisory that they may have wanted to use some other mechanism to provide a second

copy of what they were viewing by having either a cell phone or some other recording device record what they were seeing on a screen, but it appears that they all felt confident that once the data was downloaded, it was preserved. [¶] So for those reasons, the motion to dismiss pursuant to *Trombetta* and its progeny, it is hereby denied.”

The court added, “I am certain that all efforts have been made, and it is difficult when you are dealing with what might [be] a startup software company, or a software company that does not maintain first-generation computers to allow people to view earlier versions of their software.”

Defense counsel later raised concerns about the jury speculating that Castaneda did not attempt to obtain surveillance from the Amtrak station. The parties entered into the following stipulation, which was read to the jury: “On July 27, 2018,<sup>8</sup> the District Attorney’s Office gave defense counsel . . . a DVD labeled 55 Harrison Street [that] purportedly contained surveillance video from the Amtrak station”; in July and August, the parties exchanged emails about how to view the surveillance, “but neither attorney could figure out how to view it”; in September and October, defense counsel requested information on how to access the surveillance footage; in late October, the prosecutor gave defense counsel a username and password for the video, but the login information did not work for either counsel; and the footage is no longer recoverable.

As in the evidentiary hearing, Detective Jimenez and Fulgueras testified at trial about their efforts to obtain and preserve the Amtrak surveillance footage.

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<sup>8</sup> We deny Castaneda’s request for us to take judicial notice of the calendar for 2018 because it is irrelevant to the issues on appeal. (Evid. Code, § 450; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4.)

## 2. *Legal Principles*

“The federal constitutional guarantee of due process imposes a duty on the state to preserve ‘evidence that might be expected to play a significant role in the suspect’s defense.’” (*People v. Montes* (2014) 58 Cal.4th 809, 837, quoting *Trombetta, supra*, 467 U.S. at p. 488.) Where the loss of evidence rises to the level of a due process violation is governed by the principles set forth by the United States Supreme Court in *Trombetta* and *Youngblood*. (See *People v. Alvarez* (2014) 229 Cal.App.4th 761, 771 (*Alvarez*).)

Under *Trombetta*, the government’s failure to retain evidence violates due process when it “possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” (*Trombetta, supra*, 467 U.S. at p. 489.) But when evidence is only “potentially useful” to the defense, the failure to retain it violates due process only if the government acted in bad faith. (*Youngblood, supra*, 488 U.S. at p. 58; *People v. Duff* (2014) 58 Cal.4th 527, 549.)

We review the denial of a motion under *Trombetta* and *Youngblood* for substantial evidence, viewing the entire record in the light most favorable to the judgment. (*People v. Montes, supra*, 58 Cal.4th at p. 837; *Alvarez, supra*, 229 Cal.App.4th at p. 774.)

## 3. *Analysis*

Castaneda first contends the trial court erred in denying his motion to dismiss because the Amtrak video had apparent exculpatory value before it disappeared. Bell told police that someone had stolen his bicycle at the station. Castaneda contends “[t]he issue is whether [he] stole the bike, which he insisted he did not.” According to Castaneda, “[i]f the Amtrak video shows

someone else stealing the bike, the reasonable inference is that this other person is the person who stabbed Mr. Bell.”

We are not persuaded the evidence would have had any meaningful exculpatory value. We first note the record does not establish that the surveillance cameras were pointing where they could see Bell’s bicycle. Assuming the cameras were, they would not necessarily show someone had stolen the bicycle and that person was someone other than Castaneda. Indeed, the latter possibility is low. Castaneda testified that he went to the station around “twilight” that evening. Bell also went to the station around 5:00 or 6:00 o’clock that evening according to Wright. But even if someone else stole the bicycle, that revelation would have aided Castaneda only minimally, if at all.

As the People argue, “[t]he identity of the person who stole Bell’s bike earlier was immaterial.” They explain that “[t]he relevant robbery for purposes of the felony murder charge was the robbery of Bell’s bike immediately prior to the stabbing.” Bell repeatedly told the police that the person who committed *that* robbery—and who subsequently stabbed him—was “Rio.” Bell also told police that his assailant rode away on Bell’s bicycle towards Jack London Square after the stabbing. This statement was corroborated by video surveillance from nearby businesses depicting Castaneda riding Bell’s bicycle away from the encampment several minutes after the stabbing. The court observed that “although the Amtrak surveillance video may show who initially came into possession of the bike, there is a person that’s clearly in possession of the bike in the Seawolf video, the Sierra video and the Shell gas station video, and with consistent clothing, et cetera.”

We agree with the People's and trial court's observations. The hypothetical situation that another person stole Bell's bicycle at the station does not by itself exculpate Castaneda as the assailant. Castaneda does not point to any evidence from which to infer that the person who stole the bicycle at the station also stabbed Bell. Castaneda merely speculates that individual might have been same person (whom he denies was him, an assertion that is itself doubtful), which in turn might have helped him impeach Bell's credibility. Thus, the notion that knowing the identity of the person who stole Bell's bicycle might have exonerated Castaneda, is attenuated. Such speculation is insufficient to meet the constitutional standard of materiality. (*People v. Fauber* (1992) 2 Cal.4th 792, 829 ["[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense'"].)

We also disagree with Castaneda's suggestions that the police should have recognized the importance of the Amtrak footage because they were aware Bell gave inconsistent descriptions of his assailant. Although Bell initially told the police his assailant was "[a] short Mexican dude," Bell later described him as Asian and about five feet three inches tall, 125 pounds, and in his twenties. Castaneda is Hispanic, in his late thirties, and five feet eight inches tall and weighed about 140 pounds at the time of the incident.

Detective Jimenez would not have reasonably concluded from these discrepancies that any footage of the bicycle theft at Amtrak would have had exculpatory value. Bell never stated that the person who stole his bicycle at the station was the same person who later confronted him at the encampment; in fact, he stated he did not know who stole the bicycle. In addition, Bell consistently identified "Rio" as his assailant, despite

uncertainty about his race, age, and physical metrics. Indeed, Detective Jimenez testified in his view that Castaneda could be mistaken as Asian and in his twenties.

In sum, we agree with the trial court that Castaneda failed to sustain his burden of proving that the unavailable evidence had any exculpatory value, and therefore the exculpatory value of the evidence could not have been apparent.

Because the unavailable evidence was only “potentially useful,” the failure to retain it did not violate Castaneda’s due process rights unless he showed the government acted in bad faith. (*Youngblood*, *supra*, 488 U.S. at p. 58.) Castaneda faults the police for its delayed efforts to obtain a viewable copy of the video despite knowing for months it could not be played on their computers. He also contends the police could have used a secondary recording device such as a cell phone or body camera to record the footage but did not do so. As to the prosecution, Castaneda asserts it failed to live up to its assurances that it would make a viewable copy of the video available. He contends the prosecution took a “lackadaisical approach” to obtaining an operable video and did not “inform defense counsel that she was on her own to gain access to the tape.” The prosecution also waited until four days before trial to obtain a new copy of the video. By then, the footage had been overwritten. According to Castaneda, the government “did essentially nothing” to preserve a viewable copy of the video. Again, we are unpersuaded.

“The due process principles invoked by defendant are primarily intended to deter the police from purposefully denying an accused the benefit of evidence that is in their possession and known to be exculpatory.” (*People v. Webb* (1993) 6 Cal.4th 494, 519–520, citing *Youngblood*, *supra*, 488 U.S. at



p. 58.) Here, there was no evidence of a purposeful denial of evidence. Castaneda ignores much of the efforts of the police, namely its technician, to recover and preserve the video in a viewable format. The prosecution also never sought to preclude the defense from obtaining the video. Indeed, the video file was copied to a disc for defense counsel, who then received the same login information for the file as the prosecution. The inability to view the video had more to do with the file's technical limitations which the police were not readily equipped to resolve than the police's own conduct.

But even if the government should have used a secondary device to record the footage or should have acted with more urgency to retrieve a new copy, we see no due process violation. Its conduct was at worst negligent. Negligence, however, “does not establish constitutional bad faith.” (*People v. Flores* (2020) 9 Cal.5th 371, 397; *United States v. Flyer* (9th Cir. 2011) 633 F.3d 911, 916 “[b]ad faith requires more than mere negligence or recklessness”]; see, e.g., *Youngblood*, *supra*, 488 U.S. at p. 58 [failure to preserve clothing with semen samples was “at worst . . . negligent” and did not evince bad faith].)

Castaneda's citation to *Alvarez*, *supra*, 229 Cal.App.4th 761, is unavailing. In *Alvarez*, the victim was robbed by approximately five men; shortly thereafter, the three defendants were apprehended. (*Id.* at p. 766.) There were two police-controlled surveillance cameras in the vicinity of the robbery and officers “were typically aware that footage was only available for a fairly short amount of time.” (*Id.* at pp. 767–768.) One of the defendants specifically asked the senior officers on the scene to check any relevant video. (*Id.* at p. 764.) The detective replied, “‘If I had video cameras of what took place, that's part of my job. My job is not to arrest people that aren't guilty of something.’” (*Id.* at pp. 764, 767, 769.) However, he later admitted he did

not review any of the footage, did not ask anyone else to do so, and disclaimed responsibility to follow up on the defendant's request. (*Id.* at pp. 764, 769, 777.) According to the officer in charge of maintaining and controlling the cameras, none of the officers involved in the defendants' arrest submitted a request to view the footage. (*Id.* at pp. 767–768.) By the time defense counsel submitted such a request, the footage had been deleted. (*Id.* at p. 768.) The trial court granted the defendants' dismissal motion, finding bad faith on the part of the police. (See *id.* at pp. 768–771.) The appellate court affirmed. (See *id.* at pp. 776–778, 780.)

Castaneda's case includes none of the indicia of bad faith described in *Alvarez*. Here, unlike in *Alvarez*, the police were not aware that the footage could exonerate Castaneda. They also at least attempted to preserve the Amtrak footage, and the prosecution made it available to the defense. The obstacles to viewing the video were largely due to the file's technical limitations, rather than a total absence of effort on the government's part. We therefore find no evidence “of official animus towards [Castaneda] or of a conscious effort to suppress exculpatory evidence.” (*Trombetta, supra*, 467 U.S. at p. 488.)

Accordingly, because the Amtrak footage was merely potentially useful evidence and neither the police nor the prosecutor acted with bad faith, the failure to preserve the footage did not violate Castaneda's due process rights.<sup>9</sup> Thus, the trial court was not required to impose any sanctions, including jury instructions. (*People v. Cooper* (1991) 53 Cal.3d 771, 811.)

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<sup>9</sup> Because we find no error, we need not consider Castaneda's assertion that the parties' stipulation concerning the efforts taken by defense counsel to obtain the video from the People did not “cure the harm caused by the *Trombetta* error.”

### ***B. Senate Bill No. 136 and Prior Prison Enhancements***

When Castaneda was sentenced, former section 667.5, subdivision (b) required courts to impose a one-year sentence enhancement for each of a defendant's prior prison terms. (*People v. Lopez* (2019) 42 Cal.App.5th 337, 340–341.) In October 2019, the Governor signed Senate Bill 136, which amends section 667.5, subdivision (b), such that the enhancement now only applies if a defendant served a prior prison term for certain sexually violent offenses. (*Lopez*, at pp. 340–341; § 667.5, subd. (b), as amended by Senate Bill 136, signed into law by Governor, Oct. 8, 2019.)

Here, the trial court imposed four one-year term enhancements to Castaneda's priors for serious felony convictions. Castaneda argues that Senate Bill 136 applies to him because the statute retroactively applies to all nonfinal judgments. (See *In re Estrada* (1965) 63 Cal.2d 740, 744–745; *People v. Lopez, supra*, 42 Cal.App.5th at p. 341.) The People concede the issue, and we agree. Because none of Castaneda's prior prison terms was for a sexually violent offense, the four one-year enhancements must be stricken. (*Lopez*, at p. 342.)

### **III. DISPOSITION**

We modify the sentence to strike the four one-year enhancements imposed pursuant to section 667.5, subdivision (b). We direct the trial court to amend the abstract of judgment to reflect this modification and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

STREETER, Acting P. J.

WE CONCUR:

TUCHER, J.

BROWN, J.